No. 11,573

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALEXANDER STEELE,

Appellant,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, and ALFRED J. FRITZ and ROBERT McWILLIAMS, as Judges thereof,

Appellees.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

This is an appeal from an order dismissing appellant's complaint for an injunction and denying the issuance of an interlocutory injunction, all to prevent the appellees from proceeding with the trial of a criminal cause, filed against appellant in said Superior Court of the State of California, on the ground that said criminal cause had been removed from the jurisdiction of said Superior Court and transferred to said District Court pursuant to the provisions of 28 U.S. C.A. 74 (Sec. 31 of the Judicial Code).

JURISDICTIONAL STATEMENTS.

The jurisdictional matters, as required by Rule 20 of this Court are as follows:

(1) Statutes conferring jurisdiction on the United States District Court.

28 *U.S.C.A.*, Sec. 41, reads in part as follows:

> "The district courts shall have original jurisdiction * * * of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

The foregoing section has been construed in *Douglas v. Jeannette,* 319 U.S. 157, 161-2, 87 L. ed. 1324, 1328.

28 *U.S.C.A.*, Sec. 377 (Judicial Code, Sec. 262) provides:

> "The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

(2) Pleadings showing the existence of the District Court's jurisdiction.

The complaint (R. 2 to 27) alleging that the complainant, by virtue of a provision of the Constitution of the State of California, is being denied a right

guaranteed to him by the Fourteenth Amendment. The provisions of the complaint will be summarized hereafter in a statement of the case.

(3) The statute conferring jurisdiction on the Circuit Court of Appeals.

28 *U.S.C.A.*, Sec. 225 (Judicial Code, Sec. 128) provides:

> "The circuit court of appeals shall have appellate jurisdiction to review by appeal final decisions—
>
> First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title."

STATEMENT OF THE CASE.

Appellant filed in the lower Court a bill of complaint (R. 2) in equity for an injunction restraining the appellees from proceeding with the trial of a California case against appellant on the ground that jurisdiction was in the United States District Court pursuant to a removal proceeding instituted under Section 31 of the Judicial Code. (28 U.S.C.A., Sec. 74.)

The substance of the bill of complaint is as follows:

That the appellant was charged by an information filed by the District Attorney of the City and County of San Francisco, in the defendant Superior Court for the violation of the provisions of Section 337a of the Penal Code of the State of California, a statute designed to prohibit and punish the acts commonly referred to as bookmaking and pool selling. (R. 3.)

The appellant pleaded not guilty of the offense, and thereafter filed with the said Superior Court, pursuant to the provisions of Section 31 of the Judicial Code (28 U.S.C.A. 74) a petition for the removal of the cause to the United States District Court for the Northern District of California (R. 4), and thereafter, pursuant to the provisions of the said statute, filed with the clerk of the District Court, copies of the process against him in the State Court and of all the pleadings, motions and other proceedings in the said action, together with a copy of his petition for removal, all of which were duly certified as being full, true and correct by the clerk of the respondent Superior Court (R. 5), and caused the clerk of the District Court to docket the case, as numbered therein 30514 H, serving written notice of said docketing upon the District Attorney. (R. 5-6.)

Paragraph X of the bill of complaint alleges:

> "That upon the filing of said petition for removal in said Superior Court by Complainant as aforesaid, said defendant Superior Court and the defendant judges, Alfred J. Fritz and Robert McWilliams, then and there lost and were divested of all jurisdiction to proceed further in said criminal prosecution against complainant; that upon the filing of said petition for removal, as aforesaid, and upon the filing of the copies of said process, pleadings, papers and proceedings in the above entitled court and the docketing of said cause in the above entitled court as aforesaid, said criminal prosecution against complainant was transferred to and is now within the sole and exclusive jurisdiction of the above entitled Court,

and said Superior Court and said defendant judges thereof then and there lost and were divested of the power, jurisdiction or authority to proceed with the trial of said criminal action in said Superior Court; that despite the matters and things as herein set forth, the defendants and each of them have threatened and continue to threaten and have intended and do intend to cause said prosecution to be brought to trial in said Superior Court and to commence the trial of said criminal prosecution in said Superior Court on January 27, 1947, and unless said defendants and each of them are restrained by this court, notwithstanding the fact that said criminal prosecution has been removed to the above entitled court and said Superior Court now has no jurisdiction of the subject matter of said action, that said defendants will now proceed with the trial of said criminal prosecution as herein stated." (R. 6-7.)

Paragraph XI sets forth, as grounds upon which the District Court has jurisdiction, that under the provisions of the federal statute above referred to, the United States District Court was vested with the sole and exclusive jurisdiction of the criminal prosecution and the State Court was divested of any jurisdiction thereof; and, moreover, by virtue of the provisions of Title 28 U.S.C.A., Section 377, the District Court was vested with the power to issue all writs necessary for the exercise of its jurisdiction, including the right to restrain and enjoin further proceedings in the State Court. (R. 8.)

The bill concludes with a prayer for process and for temporary and permanent injunctions to restrain the

State Court from taking any further steps in the said criminal prosecution. (R. 10.)

Annexed to the bill of complaint as an exhibit and incorporated in said complaint is a copy of the petition for removal of the prosecution from the State Court. (R. 11 to 27.) The purport of the petition for removal is as follows:

That an officer of the State of California, to-wit, a police officer of the City and County of San Francisco, without any warrant, writ or other process of any kind or character, and without the consent of appellant, forcibly broke into an apartment occupied by the complainant as his home and dwelling, in the City and County of San Francisco and, against the wish, will and consent of appellant, took certain particularly described papers, documents and writings, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, and in violation of the right of complainant to be secure in his house, papers and effects against unreasonable search and seizure. (R. 12-13.)

The petition for removal sets up the claim that the right of the people to be secure in their houses, papers and effects against unreasonable searches and seizures is protected by the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, which is a restriction upon State action.

The exhibited petition (R. 15-16) further sets forth that after appellant had been bound over for trial by a magistrate and the information lodged against him,

he filed in the State Court a motion to set aside the information couched in the following language:

> "That said defendant has been committed in violation of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States of America in that the evidence used upon a preliminary hearing of said charge and upon which evidence the court made its order holding defendant to answer had been procured by peace officers of the State of California and of the City and County of San Francisco by breaking into the home and apartment of said defendant without any lawful or other warrant of law so to do and against the will, wish and consent of said defendant and did therein, against said defendant's wish, will and consent, take into their possession certain physical evidence consisting of books, pamphlets, papers and writings, all of which more fully appears in the transcript of the testimony taken before the committing magistrate and on file in the above cause, special reference to which transcript is hereby made and by said reference included in and made a part of this motion."

This motion was denied by the Superior Court and thereafter appellant again appeared in the Superior Court and filed a motion set forth in full as an exhibit attached to said petition for the return of the property seized and the suppression of the evidence (R. 17 and 25) obtained by reason of the illegal search, which motion was also denied by the State Court, upon the ground that pursuant to the decisions of the Supreme Court of the State of California, the rule relating to

the use of evidence in courts of the State of California was different from that of the Federal Courts, and that in the State Courts there was no procedure whereby evidence otherwise competent could be excluded because of the manner in which the same was acquired, even though such acquisition of evidence had been in violation of defendant's right to be secure against an unreasonable search and seizure. (R. 17.)

The petition for removal further alleges that the evidence introduced against appellant at the trial in the State Court will be the evidence procured in violation of his rights to be secure against unlawful and unreasonable search and seizure and "that said evidence is the only evidence of any kind or character tending to connect petitioner in any manner with any one or more of the offenses set forth and charged in the said information, and that the use of said papers, documents and writings as evidence against petitioner and their admission in evidence against said petitioner in said trial will result in said petitioner being tried in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States." (R. 17.)

Paragraph X of the petition for removal (R. 18-21) alleges as follows:

> "That at all times herein mentioned section 19 of Article I of the Constitution of the State of California did read as follows:
>
> > 'Sec. 19. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches, shall not be violated; and no war-

> rant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.'

That while this State constitutional provision is in words and substance identical with the provision against unlawful search and seizure as set forth in the Fourth Amendment to the Constitution of the United States, the Supreme Court of the State of California has for many years last past construed said provision in a manner contrary to the letter, spirit and intent of the unlawful search and seizure clause as set forth in the Fourth Amendment to the Constitution of the United States and has held and construed the unlawful search and seizure clause of the Constitution of the State of California and the rights of an accused person thereunder to be as follows, to-wit:

(a) That under the law of the State of California there is no proceeding existing in a criminal action whereby a defendant and accused may bring any motion or proceeding for the purpose of suppressing as evidence against said defendant and accused evidence acquired by peace officers of the State of California in violation of the constitutional provision against unlawful and unreasonable search and seizure;

(b) That even though peace officers of the State of California acquire evidence as the result of unlawful breaking and entry into the home and dwelling of a defendant or by a burglarious entry therein there is no procedure under the law of the State of California whereby property

taken by said peace officers as the result of such unlawful or burglarious entry can be excluded as evidence at the trial of the person from whom such property was taken if such evidence is otherwise competent;

(c) That though the Constitution of California prohibits unreasonable and unlawful searches and seizures and provides that no warrant therefor shall issue except upon reasonable and probable cause, there is no procedure known to the law of the State of California that will prevent a peace officer from violating said provision or that will prevent the use in evidence of property acquired by such unlawful acts of a peace officer and that the person from whom said property is taken has no redress under the law of the State of California either in any criminal prosecution brought against the owner of such property or in any other manner or action, civil or criminal, save and except a civil action to recover possession of said property from the peace officer who so unlawfully acquired the same.

That the decisions of the Supreme Court so construing the California constitutional provision in the manner aforesaid, are the following, to-wit: People v. Mayen (1922), 188 Cal. 237; Parker v. Board Dental Examiners (1932), 216 Cal. 285, 300; Herrscher v. State Bar (1935), 4 Cal. (2d) 399, 412; People v. Gonzales (1942), 20 Cal. (2d) 165; People v. Kelley (1943), 22 Cal. (2d) 169.

That the foregoing holdings of the Supreme Court have never been deviated from and are now the law of the State of California."

The petition for removal concludes with allegations that by reason of the decisions of the Supreme Court of the State of California appellant is being denied and cannot enforce in the judicial tribunals of that State the rights secured to him by the laws of the United States providing for the equal civil rights of citizens of the United States and is being denied and will be deprived of the equal protection of the law and of due process of law as guaranteed by the Fourteenth Amendment. (R. 21.)

Attached to the petition for removal are copies of the information filed against appellant in the Superior Court (R. 23) and of the motion for the return and suppression of the evidence so unlawfully acquired (R. 25.)

Appellees filed no answer or traverse to the complaint and thus, for all purposes of the proceedings in the district court and in this Court, **the allegations of the complaint must be taken as true.**

On January 24, 1947, the district judge issued an order to show cause why a preliminary injunction should not issue. (R. 28, 29.)

Appellees countered with a motion to dismiss the complaint. (R. 29.)

On February 13, 1947, the order to show cause and the motion to dismiss the complaint came on simultaneously for hearing (R. 31) and after argument were submitted for decision.

On February 25, 1947, the district judge made an order granting the appellees' motion to dismiss the complaint. (R. 31.)

THE QUESTION INVOLVED.

Technically, the question involved is the sufficiency of the complaint to state a cause of action for an injunction. This question, in turn, resolves itself into the proposition of whether the removal petition, attached as an exhibit to the complaint (R. 11), stated facts sufficient to remove the criminal prosecution from the State Court to the District Court under Sec. 31 of the Judicial Code. The latter proposition finds its answer in whether the right to be secure against unreasonable search and seizure is a right protected by the Fourteenth Amendment from infringement by the States.

THE CALIFORNIA LAW OF SEARCH AND SEIZURE AS CONSTRUED BY THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Article I, Section 19 of the Constitution of the State of California, reads as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue, but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."

It will be noted that the foregoing Constitutional Provision is practically in the same words as the Fourth Amendment to the Constitution of the United States. In fact, the California Supreme Court held

that the adoption of the State Constitutional Provision was for the purpose of protecting the same rights and correcting the same evils as was the adoption of the Fourth Amendment.

> "It may be taken for granted that the **provisions of our own Constitution** * * * against unreasonable searches and seizures, and protecting the citizen from being compelled in any criminal case to be a witness against himself, **have been adopted, in almost the precise words and for the same reason, as in the federal Constitution.** They are safeguards designed to protect the intimate sanctity of the person and the home from invasion by the state."
>
> *People v. Mayen,* 188 Cal. 237, 249, 205 Pac. 435.

Despite the foregoing identity of language and the expression of the California Supreme Court, the latter Court has so construed the state constitutional provision against unreasonable searches and seizures, as "to reduce it to a form of words" and **to sanction, under its provisions, the most flagrant violations of personal privacy and personal security without affording in the courts of California any remedy of any kind whatsoever.**

Primarily, we emphasize the proposition that in deciding whether a state statute or constitutional provision runs counter to the Federal Constitution, the question must be decided not on the wording of the statute or provision, but on the construction of such statute or provision as made by the highest court of the State. It is on the state court's construction of

the statute that the question of its being in violation of the Constitution must be decided.

Highland Farms Dairy v. Agnew, 300 U. S. 608, 613; 81 L. ed. 835, 840.

St. Louis etc. Co. v. Arkansas, 235 U. S. 350, 362; 59 L. ed. 265, 271.

Storaasli v. Minnesota, 283 U. S. 57, 62; 75 L. ed. 839, 843.

Madden v. Kentucky, 309 U. S. 83, 87; 84 L. ed. 590, 592.

Next, we call attention to the fact that in deciding the applicability of the removal statute, Judicial Code, Sec. 31, it is immaterial whether the federal constitutional right is denied by a state statute or by a provision of the State Constitution. In this regard see

Kentucky v. Powers, 201 U. S. 1, 31; 50 L. ed. 633, 647.

In 1922 the California Supreme Court decided the case of *People v. Mayen,* 188 Cal. 237, 205 Pac. 435. It was a criminal prosecution in which the home of the defendant had been violated by state officers and certain documents taken. The court (p. 242) admitted that the search and seizure was unreasonable and unlawful and violated the constitutional provision. On the first day of his trial, the defendant presented a motion to the trial court for an order directing the return to him of the documents so unlawfully taken. The court denied the motion. Defendant also objected to the introduction of such documents in evidence, which objection was over-ruled. The defendant was

convicted and appealed, raising the contention that the search and seizure was in violation of the state constitutional provision and that the admission in evidence of the articles over his objection, was error. The Supreme Court first pointed out (p. 243) that a trial court would not stop the progress of a trial to determine the manner in which competent evidence was received.[1]

Next, the State Supreme Court pointed out (p. 248) that in the Federal Courts, the property acquired by unreasonable search and seizure was admissible in evidence unless "the aggrieved party has preserved his right to object to its use by a timely application before the trial for an order restoring to his possession the property unlawfully seized." Then, the Supreme Court paid lip service to the Constitution by stating (p. 250) "that the seizure by officers of the law of private papers and effects by unlawful and unauthorized entry and search, to be used as evidence in criminal prosecutions of the persons from whom taken, is a violation of the constitutional right to security against unreasonable searches and seizures." Then **the Court definitely held that in the criminal prosecution itself, there was no step that could be taken by the defendant for the return or suppression of such evidence even though taken in violation of the constitutional provision.** Its language in this regard (p. 251) is as follows:

> "The right of one whose goods have been unlawfully seized to recover their possession, and that

[1]Appellant finds no fault with this rule as it is a rule sanctioned both in the Federal and State Courts.

irrespective of its effect in depriving the state of their use in evidence, is not disputed, but the contention, which we think is maintained by the great weight of authority, is that the proceeding for such recovery is independent of the criminal proceeding in which it is sought to use such articles as evidence. Even conceding the right to demand such recovery by motion before the court in which such criminal action is pending, as is apparently the rule in the federal courts and as recognized in some of the state decisions (People v. Kinney, 185 N.Y. Supp. 645; State v. Peterson, 27 Wyo. 185 [13 A.L.R. 1284, 194 Pac. 342]), upon what theory can it be held that such proceeding is an incident of the trial, in such a sense that the ruling thereon goes up on appeal as part of the record and subject to review by the appellate court? It seems to us rather an independent proceeding to enforce a civil right in no way involved in the criminal case. The right of the defendant is not to exclude the incriminating documents from evidence, but to recover the possession of articles which were wrongfully taken from him. That right exists entirely apart from any proposed use of the property by the state or its agents.

Its determination involves the framing of separate issues of fact as to the rights of possession of the goods and the method of seizure, by whom taken, and whether or not the trespass was committed by an agent of the state.

The court having tried such issue, and, as in the case before us, denied the relief demanded, we question if under any procedure recognized in the state of California such ruling can be collaterally attacked. As well might a collateral attack upon

> a judgment-roll received in evidence on a trial be maintained on appeal therefrom on the ground that it was invalid because of some extrinsic fraud in its procurement. Only matters incident to the cause of action on trial are subject to review on appeal therefrom, and for this reason it is held that an objection on the trial to the admission of evidence on the ground that it has been wrongfully seized does not lie, and cannot be reviewed on appeal, but that any rights so involved must be raised in an independent proceeding."

Thus the California Supreme Court definitely decided that there is no procedure that can be invoked in a criminal prosecution whereby a defendant can assert the rights guaranteed to him by the Federal Constitution and that the deprivation of such rights cannot be reviewed on appeal from a judgment of conviction.

Next, the California court held (pp. 252-3) that the constitutional rights of a defendant are not violated by using his private papers as evidence against him and that "it was the invasion of his premises and the taking of his goods that constituted the offense," and refused to follow in the State of California the rules set forth in *Gouled v. United States,* 255 U.S. 313, in which it was held that the right to be secure against unreasonable search and seizure included the right not to have articles taken as the result thereof used in evidence against the person from whom taken.

On page 255 of the reported case, the California Court again held that any person aggrieved by a violation of his constitutional right must be left to an independent action to protect such right and to obtain redress for its enforcement, and that the only appeal that would lie was from the order made in such independent proceeding and that such violation of constitutional rights could not be reviewed on appeal from a judgment of conviction in a criminal case in which the seized property was used as evidence.

In 1932 a portion of the question was again before the California Supreme Court in *Parker v. Board of Dental Examiners,* 216 Cal. 285, 14 Pac. (2d) 67, and it reaffirmed its holdings in the *Mayen* case, supra.

In 1935 the California Supreme Court decided the case of *Herrscher v. State Bar,* 4 Cal. (2d) 399, 49 Pac. (2d) 832. In the *Herrscher* case a private investigator was employed by private parties, entered Herrscher's office without authority or permission and made photostatic copies of many private papers which were used in the disbarment proceeding, which was the subject of the suit. Once again the Supreme Court reaffirmed its decision in the *Mayen* case and quotes from that case (p. 412) as follows:

> "The constitution and the laws of the land are not solicitous to aid person charged with crime in their efforts to conceal or sequester evidence of their iniquity. From the necessities of the case the law countenances many devious methods of procuring evidence in criminal cases. The whole system of espionage rests largely upon deceiving

> and trapping the wrongdoer into some involuntary disclosure of his crime. It dissimulates a way into his confidence; it listens at the keyhole and peers through the transom-light. It is not nice, but it is necessary in ferreting out the crimes against society which are always done in darkness and concealment."

In 1942 the case of *People v. Gonzales,* 20 Cal. (2d) 165, 124 Pac. (2d) 44, came before the State Supreme Court. In that case the facts were as follows: Gonzales and Chierotti were charged with the crime of grand theft. Chierotti lived in an apartment house in San Francisco. Two police officers without any warrant, authority or permission, entered Chierotti's apartment and took therefrom a black travelling bag and contents which subsequently were admitted in evidence against Chierotti and Gonzales at the trial. Chierotti many weeks before the commencement of the trial, filed a written motion in the criminal cause for an order directing the return to him of the case and contents and the exclusion from evidence, not only of this property but of any testimony of the officers as to the facts acquired in the course of this unlawful and unreasonable search and seizure. The trial court denied the motion. When the articles and testimony of the officers were offered in evidence at the trial, such things were admitted over the objection of defendants. The motion for the return and suppression of evidence and the objections to admission of such evidence, were based on the ground that they were all in violation of the due process clause

of the Fourteenth Amendment. Defendants were convicted and appealed and the California Supreme Court affirmed the convictions and in doing so, held as follows:

That although in the Federal Courts the introduction in court of evidence obtained by an illegal search and seizure is forbidden if a timely motion for its exclusion is made by the accused, the rule in California is that, even though such timely motion be made, the evidence is nevertheless admissible. Then the decision of the California Court states (p. 169):

> "The defendant may have civil and criminal remedies against the officers for their illegal acts * * * but the state is not precluded from using the evidence obtained thereby."

Following the foregoing language, the California Court states that "California is free to interpret its own Constitution," and then discussed the contention raised by defendants that the right to be secure from unreasonable search and seizure was protected by the Fourteenth Amendment which precluded the use of evidence so acquired. In the latter regard, the California Court, at page 170, states:

> "In the determination of whether the prohibition against unreasonable searches and seizures is included within this concept, the unlawful search and seizure must be distinguished from the introduction in court of the evidence obtained as a result thereof. 'The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures' may be so fundamental as to make any unreason-

able search and seizure by a public officer a violation of due process of law. It does not necessarily follow, however, that the use in a court of law of evidence thus obtained is so contrary to fundamental principles of liberty and justice as to constitute a denial of due process of law. * * * While the United States Supreme Court has held that the due process clause includes the guarantee of the Fifth Amendment against compulsory self-incrimination to the extent that the Amendment forbids the use of a confession obtained by coercion or torture (Chambers v. Florida, supra; Brown v. Mississippi, supra; Lisenba v. California, supra. See Bram v. United States, 168 U. S. 532 [18 S. Ct. 183, 42 L. Ed. 568]), it has done so because a confession obtained by coercion or torture is so unreliable that its use violates all concepts of fairness and justice. (Chambers v. Florida, supra; Brown v. Mississippi, supra; Lisenba v. California, supra; cf. Twining v. New Jersey, supra.) The use of evidence obtained through an illegal search and seizure, however, does not violate due process of law for it does not affect the fairness or impartiality of the trial. (People v. Defore, 242 N. Y. 13 [150 N. E. 585]; People v. Mayen, supra; Com. v. Donnelly, 246 Mass. 507 [141 N. E. 500]; Johnson v. State, 152 Ga. 271 [109 S. E. 662, 19 A. L. R. 641].) The fact that an officer acted improperly in obtaining evidence presented at the trial in no way precludes the court from rendering a fair and impartial judgment. It has long been an established rule of evidence that "the admissibility of evidence is not affected by the illegality of the means through

> which the party has been enabled to obtain the evidence."

Thus we find the state court holding that there is no remedy in the state courts given to a person accused of crime, other than a civil suit against the officers for their illegal acts, for a violation of such right.

Two of the California justices dissented from the majority opinion rendered in the *Gonzales* case and the dissenting opinion will be found beginning at page 174.

In 1943 the case of *People v. Kelley,* 22 Cal. (2d) 169, 137 Pac. (2d) 1, was decided by the California Supreme Court, and again that court reaffirmed its holdings theretofore made in the *Mayen* and *Gonzales* cases and at page 173 stated:

> "In the recent case of People v. Gonzales, supra, the California cases involving the admissibility of evidence obtained by unlawful search and seizure were reviewed, and the court considered the question whether the use of evidence so secured was a denial of due process of law guaranteed by the Fourteenth Amendment. It was concluded that the use of evidence obtained through an illegal search and seizure does not violate due process of law because it does not affect the fairness or impartiality of the trial. The fact that an officer acted improperly in securing evidence presented against a defendant does not prevent the court from rendering a fair and impartial judgment."

It is thus demonstrated that the California constitutional provision against unreasonable searches and seizures has been construed by the highest court of the State of California in such a manner as to bring about the following results:

1. Where a person's home has been violated by state officers and unlawful entry made and property unlawfully seized, in a criminal prosecution in which such unlawfully seized property is evidence against the owner, the law of California does not give to the accused any right, motion or procedure in such criminal case, no matter how seasonably such right is asserted, whereby he can procure a return of such property or suppress its use as evidence.

2. That even though a seasonable motion is made for the return of such property and its suppression as evidence and such motion is denied and the owner convicted, the question of the propriety of the trial court's action can not be reviewed on appeal.

3. That the only remedy given to one whose property has been seized by state officers as the result of an unlawful and unreasonable search and seizure, is a civil suit against the state officers.

4. That despite the wording of the state constitutional provision against unreasonable searches and seizures, such searches and seizures are sanctioned and condoned to the extent that state officers can violate every right of a defendant in such regard and there is no state remedy to prevent use of the evi-

dence so acquired as evidence against the accused in a criminal prosecution.

As to the latter proposition, we adopt the language used by Mr. Justice Carter in his dissenting opinion in the *Gonzales* case, supra:

> "It cannot be seriously questioned that to permit the use of evidence obtained in violation of the constitutional provision at least to some extent infringes upon the field of liberty secured by the inhibition against unlawful searches and seizures. But it goes beyond a mere partial invasion. It in effect practically destroys the right. That is true for the reason that the value of any right varies in direct proportion to the means afforded for the protection of the right; the realization of any benefit from the right is wholly dependent upon the existence of instruments for that purpose. If it may be violated and the fruits of the violation directed against the possessor of it, the fruits of it are lost, and it is no more than a bare abstraction. * * * Permitting such evidence to be used is an invitation and encouragement to law enforcing officials to violate the Constitution. It gives them free reign to act upon mere suspicion and conjecture, to the harassment of the persons offended and to the end that the sanctity of his home or depository of his papers and effects is destroyed. It is of small comfort to say that he has an action against the officers. In most instances the amount of recovery would be negligible and the process costly."

As demonstrative of the utter destruction of the constitutional guarantee in California and the extreme

lengths to which officers of that state can go in violation of the constitutional right, we call attention to the most recent case of *People v. One Mercury Sedan,* 74 C. A. (2d) 199, 168 Pac. (2d) 443, **in which case the trial court excluded the illegally acquired evidence, the District Court of Appeal reversed the trial court and the Supreme Court of California denied a hearing.** The facts are sufficient to shock every person who has regard for the fundamental rights of citizens. These facts, as stated in the reported case, are as follows:

> "The record discloses that on April 18, 1944, an inspector of the State Division of Narcotic Enforcement followed the Williams car for some distance. He testified that he then knew the car was being used to transport marihuana. The inspector picked up two police officers and then stopped the Williams car then being driven by Williams. Williams got out of the car. The inspector handcuffed one of the passengers and then came over to where the police officers were attempting to search Williams. As he approached, Williams, who had some brown paper in his hands, put the paper in his mouth and tried to pull away from the officers. The inspector asked Williams what he had put in his mouth and was told it was gum. The inspector tried to force Williams' mouth open, and in doing so got his finger between Williams' teeth. Williams bit down on the inspector's finger, and, in the ensuing struggle, Williams succeeded in swallowing what he had in his mouth. One of the officers during the struggle succeeded in handcuffing Williams' hands behind his back.

> Williams, still handcuffed, was then put in the inspector's car and taken by the officers to the emergency hospital. He was there placed on an operating table with his hands cuffed in front of him. He was told that the doctor there present was going to pump out his stomach, and, if necessary, they would strap him to the table and use force. Williams stated that would not be necessary. A doctor thereupon forced a tube through Williams' mouth and down his throat and proceeded to pump out the contents of his stomach. Towards the end of this operation Williams began to kick his legs about and the officers then held his legs down on the table.
>
> The substances pumped out of Williams' stomach were placed in jars by the inspector and later delivered to another inspector of the State Division of Narcotic Enforcement whose duty it was to make analyses of narcotic drugs. This chemist made an analysis of the contents of the jars and found that they contained marihuana."

The California Supreme Court, by denying a hearing, approved and sanctioned the use of evidence so obtained.

A reading of the foregoing facts may well pose the question as to what further lengths state officers can and will go, under the decisions of the Supreme Court of California, in acquiring evidence. If they can resort to the use of stomach pumps, it is not beyond the realm of probability that eventually they will be performing capital operations on persons for the purpose of procuring evidence and the persons so cut

open will have no redress under the laws of California.

It is high time that these state evils be corrected by the Federal Courts.

APPELLANT'S POSITION AND CONTENTIONS AND THE LAW IN GENERAL.

At the outset, we state that appellant is not disputing the rule that a trial judge does not have to stop the trial of a criminal action to try the collateral issue of the manner in which evidence has been acquired by state officers.

Neither do we dispute the rule that where no timely objection is made to the use of evidence acquired in violation of an accused's constitutional rights, the admission of such evidence at his trial, if otherwise competent, does not necessitate a reversal of a judgment of conviction.

Appellant contends that the right to be secure against unreasonable search and seizure is protected by the Fourteenth Amendment; that where such right is violated the defendant by timely motion can have the return of the property ordered by the trial judge and its use as evidence suppressed; that where the state law denies not only such right but any procedure in its courts for the enforcement or protection of such right, such state action is a violation and denial of a right guaranteed by the Federal Constitution.

Specifically, appellant contends that the decisions of the highest court of the State of California have so construed the state constitutional provision against unreasonable searches and seizures as to destroy such right in its entirety and so as to deny to any person so injured by state action any process or procedure in that state's courts for the enforcement or protection of such right.

The denial by a state of a right guaranteed by the Federal Constitution is always a ground for action and redress by the Federal Courts and justifies the removal of a state criminal prosecution, wherein such right cannot be enforced, to a Federal District Court for trial.

The removal statute, 28 U. S. C. A. sec. 74, Criminal Code, sec. 31, reads in part as follows:

> "When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States * * * such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next district court to be held in the district where it is pending. Upon the filing of such petition all further pro-

ceedings in the State courts shall cease and shall not be resumed except as hereinafter provided. * * * "

The purport and extent of the foregoing provision was set forth in *Kentucky v. Powers,* 201 U. S. 1, 27, 50 L. ed. 633, 645, as follows:

"After referring to what was said in *United States v. Reese,* 92 U. S. 214, 23 L. ed. 563, to the effect that the rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress, and that the form and manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide, the court said: 'There is express authority to protect the rights and immunities referred to in the 14th Amendment, and to enforce observance of them by appropriate congressional legislation. And one very efficient and appropriate mode of extending such protection and securing to a party the enjoyment of the right or immunity is a law providing for the removal of his case from a state court, in which the right is denied by the state law, into a Federal court where it will be upheld. This is an ordinary mode of protecting rights and immunities conferred by the Federal Constitution and laws.' "

In *Hull v. Jackson County Circuit Court* (CCA-6), 138 Fed. (2d) 820, 821, it is stated:

"The removal of a criminal prosecution or a civil cause under the statute in question because of the denial of a civil right or the enforcement of such a right must arise out of the destruction

of such right by the constitution or statutory laws of the state wherein the action is pending."

Here we have a case where a right protected by the 14th Amendment not only is denied to appellant in the California courts but, by the construction of the State Constitutional provision by the highest court of the state, is actually destroyed.

The California court has held that there is no procedure recognized in that state for the enforcement or protection of the right covered by the 14th Amendment. Where the state provides for no corrective process in its courts for the enforcement or protection of a Federal Constitutional right, then the matter is one that can be immediately corrected in the Federal Courts. (Cf. *Woods v. Nierstheimer,* 328 U. S. 211, 217, 90 L. ed. 1177, 1181; *Carter v. Illinois,* 90 L. ed. Ad. Opinions, 150, 161, decided Dec. 9, 1946.)

THE FOURTEENTH AMENDMENT PROTECTS FROM STATE ENCROACHMENT EVERY RIGHT WHICH IS A FUNDAMENTAL PRINCIPLE OF LIBERTY AND JUSTICE.

The Supreme Court of the United States has consistently and repeatedly held that any right which is a fundamental principle of liberty and justice lying at the base of our civil and political institutions, is protected by the Due Process Clause of the Fourteenth Amendment. These holdings of the Supreme Court have been made irrespective of whether such right is set forth in the first eight Amendments to

the Constitution. The fact that any such right is set forth in the Amendments constituting our Bill of Rights, adds greater force to the contention that it is such a fundamental principle of liberty and justice.[2]

We here cite and quote from the Federal Supreme Court decisions defining the nature and character of the rights protected by the Fourteenth Amendment.

In *Powell v. Alabama,* 287 U. S. 45, 77 L. ed. 158, certain negroes had been convicted in the State of Alabama of the crime of rape. Certiorari was granted by the Supreme Court of the United States to review the convictions **solely on the ground that the defendant Powell had not been allowed to be represented by counsel at the trial.** The contention was raised that the right to have counsel was contained in the Sixth Amendment to the Federal Constitution which did not operate upon the states and therefore did not fall within the due process clause of the Fourteenth Amendment. The court held to the contrary and in doing so announced that it was the duty of the court to decide "whether the denial of the assistance of counsel contravenes the due process clause of the

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[2]Appellant does not contend that because the right to be secure from unreasonable search and seizure is set forth in the Fourth Amendment that perforce this right is covered by the Fourteenth Amendment. The contention is that the right to be so secure from unreasonable search and seizure is such a fundamental right that it is protected by the Fourteenth Amendment. The fact that such right is found in the Fourth Amendment merely adds weight to the claim that it is covered by the Fourteenth Amendment. In the cases hereinafter cited, the Federal Supreme Court discusses the nature of the **right** as distinguished from the Fourth Amendment itself.

Fourteenth Amendment of the Federal Constitution." (p. 60) and then, at page 67, stated:

> "The fact that the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' (Hebert v. Louisiana, 272 U. S. 312, 316, 71 L. ed. 270, 272, 48 A.L.R. 1102, 47 S. Ct. 103), is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, although it be specifically dealt with in another part of the federal Constitution. Evidently this court, in the later cases enumerated, regarded the rights there under consideration as of this fundamental character. That some such distinction must be observed is foreshadowed in Twining v. New Jersey, 211 U. S. 78, 99, 53 L. ed. 97, 106, 29 S. Ct. 14, where Mr. Justice Moody, speaking for the court, said that ' * * * it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action because a denial of them would be a denial of due process of law. Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 S. Ct. 581. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.' "[3]

[3]All emphasis in quotations from decisions have been supplied by the writer.

In *Mooney v. Holohan,* 294 U. S. 103, 79 L. ed. 791, our State Attorney General contended that a deprivation of due process could not result from any act of a prosecuting attorney, such as the introduction of known perjured testimony. The Supreme Court held against this contention and said:

> "Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. **That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions.** Hebert v. Louisiana, 272 U. S. 312, 316, 317, 71 L. ed. 270, 273, 47 S. Ct. 103, 48 A.L.R. 1102. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. **Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.**"

In *Brown v. Mississippi,* 297 U. S. 278, 80 L. ed. 682, three negroes were convicted of murder in the courts of the State of Mississippi. The only evidence connecting the defendants with the crime were con-

fessions obtained from the defendants by means of force and torture. The state supreme court upheld the convictions on the ground that immunity from self-incrimination was not essential to due process of law and that the admission of the confessions was mere error in the trial of the cause and not the violation of a constitutional right. The Supreme Court of the United States granted a writ of certiorari and reversed the convictions on the ground that the use of such evidence violated the due process clause of the Fourteenth Amendment.

The State of Mississippi contended that the extortion of a confession, while it might constitute self-incrimination, did not violate a Federal constitutional right. The Supreme Court disposed of this contention as follows:

> "The State stresses the statement in Twining v. New Jersey, 211 U. S. 78, 114, 53 L. ed. 97, 112, 29 S. Ct. 14, that 'exemption from compulsory self-incrimination in the courts of the States is not secured by any part of the Federal Constitution,' and the statement in Snyder v. Massachusetts, 291 U. S. 97, 105, 78 L. ed. 674, 677, 54 S. Ct. 330, 90 A.L.R. 575, that 'the privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the State'. But the question of the right of the State to withdraw the privilege against self-incrimination is not here involved. **The compulsion to which the quoted statements refer is that of the processes of justice by which the accused may be called as a witness and required to testify. Compulsion by torture to extort a confession is a different matter.**"

It will be noted that the court held the right of a State to compel self-incrimination was limited to the right of a State, by statutory sanction, to call an accused as a witness and require him to testify; **that to compel him to give evidence against himself other than in a mode sanctioned by law and justice fell within the condemnation of the Constitution.**

In the case at bar, the procuring of evidence against petitioner in a manner directly condemned by the Constitution, is the equivalent of procuring such evidence in a manner not sanctioned by law.

The Supreme Court, in *Brown v. Mississippi,* supra, after discussing the case of *Powell v. Alabama,* supra, and *Mooney v. Holohan,* supra, stated:

> "And the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence. **The due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'.**"

Following which the Supreme Court reversed the convictions on the ground that defendants had been deprived of due process of law and closed their opinion with the following language:

> "In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the confessions has been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be

based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner."

Our Federal Supreme Court has thus declared that if any personal right is of such a character that it cannot be denied without violating "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," such right comes within the protection of the Fourteenth Amendment.

THE RIGHT TO BE SECURE AGAINST UNREASONABLE SEARCHES AND SEIZURES IS A FUNDAMENTAL PRINCIPLE OF LIBERTY AND JUSTICE PROTECTED BY THE FOURTEENTH AMENDMENT.

In every instance where the Supreme Court of the United States has been called upon to construe the **right** to be secure from unreasonable search and seizure, it has unequivocally held such right to be a fundamental principle of liberty and justice and as of the very essence of constitutional liberty.

The latest expression of the Supreme Court on this subject will be found in the case of *Harris v. United States,* decided May 5th, 1947, 91 L. ed. ad. opinions 1013, 1016, where it is stated:

"This Court has consistently asserted that the rights of privacy and personal security protected by the Fourth Amendment . . . are to be

regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen . . ."

We quote from a few decisions of the Supreme Court defining the high nature of the right and giving some of the history leading to its establishment.

In *Gouled v. United States,* 255 U. S. 298, 65 L. ed. 647, the Supreme Court, in discussing the Fourth and Fifth Amendments to the Federal Constitution said:

"It would not be possible to add to the emphasis with which the framers of our Constitution and this court (citing cases) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two amendments. The effect of the decisions cited is that **such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen**—the right, to trial by jury, to the writ of habeas corpus and to due process of law. It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly overzealous executive officers."

In *Byars v. United States,* 273 U. S. 28, 33, 71 L. ed. 520, 524, it is said:

> "The 4th Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right."

In the case of *Boyd v. United States,* 116 U. S. 616, 29 L. ed. 746, the court devotes many pages to the history that led up to the Fourth Amendment to the Constitution of the United States and deals at length with the decision of Lord Camden in the case of *Entick v. Carrington* wherein the holding was first made that officials could not unlawfully enter an Englishman's house and take therefrom any books, papers or effects or use them thereafter for the purpose of prosecuting the home owner. The decision is quoted from at length and Mr. Justice Bradley, speaking for the court, said that the decision of Lord Camden "was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country" and that it was regarded "as one of the permanent monuments of the British Constitution".

The court then points out that the rules laid down by Lord Camden were in the minds of the framers of our Constitution at the time of the adoption of the Fourth Amendment, and, at page 630 of the reported

case, referring to the importance of the rights so secured said:

> "The principles laid down in this opinion **affect the very essence of constitutional liberty and security.** They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. **It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense;** it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. **Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment.** In this regard the Fourth and Fifth Amendments run almost into each other."

At page 633, this court dwelt upon the evil results that would follow from giving any other interpretation to the Fourth Amendment, and in doing so said:

> "We have already noticed the intimate relation between the two Amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the pur-

pose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself', which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment."

In the more recent case of *Go-Bart Importing Co. v. United States,* 282 U. S. 344, 75 L. ed. 374, 382, the foregoing principles were reaffirmed by the Supreme Court:

"The first clause of the 4th Amendment declares: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated.' It is general and forbids every search that is unreasonable; **it protects all, those suspected or known to be offenders as well as the innocent, and unquestionably extends to the premises where the search was made and the papers taken.** Gouled v. United States, 255 U. S. 298, 307, 65 L. ed. 647, 651, 41 S. Ct. 261. The second clause declares, 'and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized'. This prevents the issue of warrants on loose, vague or doubtful bases of fact. It emphasizes the purpose to protect against all general searches. **Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of**

every state in the Union. Agnello v. United States, 269 U. S. 20, 33, 70 L. ed. 145, 149, 51 A.L.R. 409, 46 S. Ct. 4. **The need of protection against them is attested alike by history and present conditions. The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted.''**

''General searches have long been deemed to violate fundamental rights. It is plain that the Amendment forbids them. In Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, Mr. Justice Bradley, writing for the court, said (p. 624): 'In order to ascertain the nature of the proceedings intended by the 4th Amendment to the Constitution under the terms ''unreasonable searches and seizures'', it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced ''the worse instrument of arbitrary power, the most destructive of English liberty, that ever was found in an English law book''; since they placed ''the liberty of every man in the hands of every petty officer''.' ''

Marron v. United States, 275 U. S. 192, 195, 72 L. ed. 231, 236.

In *Weeks v. United States,* 232 U. S. 383, 391, 58 L. ed. 652, 655, it is said:

> "In *Bram v. United States,* 168 U. S. 532, 42 L. ed. 568, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547, this court, in speaking by the present Chief Justice of Boyd's Case, dealing with the 4th and 5th Amendments, said (544):
>
> **'It was in that case demonstrated that both of these Amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty** which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change.' "

Summarized, the decisions of the court have pronounced the constitutional prohibition against unlawful search and seizure to be a right **"indispensable to the 'full enjoyment of personal security, personal liberty and private property' "** and that it is **"to be regarded as the very essence of constitutional liberty"** (*Gouled v. United States, supra*); that it is an **"indefeasible right of personal security, personal liberty and private property"** (*Boyd v. United States, supra*); that it is a principle **"of humanity and civil liberty"** (*Weeks v. United States, supra*); and that a violation of such right is **"obnoxious to fundamental principles of liberty"** (*Go-Bart Importing Co. v. United States, supra*) and has **"long been deemed to violate fundamental rights"**. (*Marron v. United States, supra.*)

The foregoing clearly establishes that the right to be secure against unlawful search and seizure is brought within the purview of due process as contained in the Fourteenth Amendment.

THE RIGHT TO BE SECURE AGAINST UNREASONABLE SEARCHES AND SEIZURES PROHIBITS THE USE AS EVIDENCE OF THE PROPERTY OBTAINED AND KNOWLEDGE GAINED THEREBY.

The California Supreme Court attempts to draw a distinction between the unlawful search conducted by state officers and the use as evidence of property taken or knowledge acquired as the result of such unlawful search (*People v. Gonzales,* supra).

The foregoing is directly contrary to the decisions of the Federal Supreme Court which, in every instance, have held that to acknowledge the right but to permit the use of evidence or information acquired in violation of the right is in effect to nullify the right itself.

In *Olmstead v. United States,* 277 U. S. 438, 463, 72 L. ed. 944, 950, this court said:

> "But in the Weeks Case, and those which followed, this court decided with great emphasis, and established as the law for the Federal courts, that **the protection of the 4th Amendment would be much impaired unless it was held that not only was the official violator of the rights under the Amendment subject to action at the suit of the injured defendant, but also that the evidence thereby obtained could not be received.**"

Silverthorne Lumber Co. v. United States, 251 U. S. 382, 64 L. ed. 319, 24 A.L.R. 1426, was a case where an indictment had been brought against the two Silverthornes and they were arrested and detained in custody. While in custody a representative of the Federal Government, without a warrant, went to the office of the Silverthornes and took all the papers and records that were there. A motion was made for the return of these papers. The Government had made copies thereof. The court ordered the originals returned to the defendant, and new indictments were found by the grand jury based upon the evidence illegally obtained. **The court held that not only were the Silverthorns entitled to the return of their original papers but that the Government could not use any information thereby obtained either at the trial or for the purpose of procuring new indictments,** and said:

> "The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession; but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act. Weeks v. United States, 232 U. S. 383, 58 L. ed. 652, L. R. A. 1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1117, to be sure, had established that laying the papers directly before the grand jury was

unwarranted, but it is taken to mean only that two steps are required instead of one. **In our opinion such is not the law. It reduces the 4th Amendment to a form of words.** 232 U. S. 393. **The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.** Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but **the knowledge gained by the government's own wrong cannot be used by it in the way proposed."**

In *Weeks v. United States, supra,* we find a set of facts paralleling those in the case at bar, and in dealing with the use of evidence acquired by an unlawful search and seizure the Court said:

"The case in the aspect in which we are dealing with it involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States marshal holding no warrant for his arrest and none for the search of his premises. The accused, without awaiting his trial, made timely application to the court for an order for the return of these letters, as well as other property. This application was denied, the letters retained and put in evidence, after a further application at the beginning of the trial, both applications asserting the rights of the accused under the 4th and 5th Amendments to the Constitution. **If letters and private docu-**

> ments can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."

Byars v. United States, 273 U. S. 28, 71 L. ed. 520, 522, is a reaffirmation of the doctrine:

> "Nor is it material that the search was successful in revealing evidence of a violation of a federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been tolerated by this Court, **nor can it be tolerated under our constitutional system, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed.**"

Thus, the right to be immune from an unlawful search and seizure by the state includes the right not to have used against one, as evidence in a criminal case, property or information acquired by the state while conducting such unlawful search and making such unlawful seizure.

In every instance the Supreme Court has condemned **the use** by a state of evidence acquired in a manner proscribed by the Constitution.

In *Chambers v. Florida, supra,* the Fourteenth Amendment was deemed to be violated when the state

used a confession improperly obtained. This Court's language follows:

> "However, **use by a State** of an improperly obtained confession may constitute a denial of due process of law as guaranteed in the Fourteenth Amendment. Since petitioners have seasonably asserted the right under the Federal Constitution **to have their guilt or innocence of a capital crime determined without reliance upon confessions obtained by means proscribed by the due process clause of the Fourteenth Amendment,** we must determine independently whether petitioner's confessions were so obtained, by review of the facts upon which that issue necessarily turns."

In *Mooney v. Holohan, supra,* the Court held that **the use** by a state of known perjured testimony as evidence violated the due process clause. *Brown v. Mississippi, supra, Lisenba v. California, infra,* and all other cases dealing with confessions extorted by force, violence or intimidation, held convictions, **based upon their use,** void as lacking due process of law.

It is **the use** by a state of evidence acquired in a manner proscribed by the Constitution that constitutes the taking of life, liberty or property without due process of law.

NO DISTINCTION EXISTS BETWEEN THE USE OF CONFESSIONS OBTAINED IN VIOLATION OF THE CONSTITUTION AND THE USE OF EVIDENCE ACQUIRED BY AN UNREASONABLE SEARCH AND SEIZURE.

The California Supreme Court acknowledges that the use by a state of a confession procured by force, violence or intimidation constitutes a denial of due process of law. That Court, however, attempts to draw a distinction between such unlawfully procured confessions and evidence acquired by an unlawful search and seizure by holding that the manner of procuring the confession has been declared by the Federal Court to be obnoxious to the Fourteenth Amendment because "a confession obtained by coercion or torture is so unreliable that its use violates all concepts of fairness and justice" while the use of evidence "obtained through an illegal search and seizure does not violate due process of law for it does not affect the fairness or impartiality of the trial." (*People v. Gonzales, supra.*)

The foregoing reasoning of the California Court is fallacious and directly contrary to the doctrine announced by the U. S. Supreme Court.

In *Lisenba v. California,* 314 U. S. 219, 86 L. ed. 166, it is expressly stated that the rule as to confessions **was not based on the fact that they may be false.** The Court's language therein is as follows (p. 236):

> "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false."

In *Marron v. United States,* 275 U. S. 192, 196, 72 L. ed. 231, 237, this Court has placed convictions obtained by means of unlawful seizures and forced confessions on identically the same footing:

> "The tendency of those who execute the criminal laws of the country to obtain conviction **by means of unlawful seizures and enforced confessions** * * * should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

As demonstrative of the fallacy of the State Court's decisions and as showing that there is no distinction, in the constitutional right involved, between enforced confessions and property obtained by unlawful seizures we present the two following hypothetical cases:

Case 1. A man has committed a crime. A state officer points a gun at him and under threat of shooting him to death forces him to sign a confession of guilt. There is no other evidence presented in the case except proof of the *corpus delicti* and the confession. The man is convicted.

Under the interpretation of the Fourteenth Amendment, as accepted by the state Court, the use of such confession, procured under such circumstances, is a violation of the Fourteenth Amendment and necessitates a reversal of the conviction.

Case 2. A man has committed a crime. A state officer at the point of a gun enters his home and under

threat of shooting him to death compels him to deliver over incriminating evidence. There is no other evidence presented in the case except proof of the *corpus delicti* and the incriminating evidence procured by the state officer under the foregoing circumstances. The man is convicted.

As the Fourteenth Amendment excludes the use of the confession in Case 1 it must equally exclude the use of the incriminating evidence in Case 2. In each instance the evidence has been procured in identically the same manner. Yet, under the interpretation of the State Court, the incriminating evidence would be admissible and could not be excluded in Case 2 although the confession in Case 1 would be inadmissible. No distinction exists between the two cases.

THE DENIAL OR DESTRUCTION OF THE RIGHT TO BE SECURE AGAINST UNREASONABLE SEARCH AND SEIZURE CANNOT BE JUSTIFIED ON THE GROUND THAT IT IS A LOCAL QUESTION OR MERELY INVOLVES THE REGULATION OF PROCEDURE AND EVIDENCE IN THE STATE COURTS.

The decisions of the California Supreme Court seek to justify the use of evidence unlawfully obtained by State officers as being but a regulation of State Court procedure and rules of evidence.

While a State is free to regulate the procedure of its Court, it, nevertheless, is bound in so doing by the provisions of the Federal Constitution. Thus, in *Brown v. Mississippi,* supra, the Federal Supreme Court states:

> "The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' "

In the late case of *Angel v. Bullington* (decided February 17, 1947), 91 L. ed. Ad. Opinions 557, 560, the inability of a State to deny a federal question under the guise of local practice is stated as follows:

> "This pervasive principle of our federal law, constitutional and statutory, was thus put by Mr. Justice Holmes: 'Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.' Davis v. Wechsler, 263 US 22, 24, 68 L ed 143, 145, 44 S Ct 13."

The right contended for herein being a Federal right guaranteed by the Federal Constitution, cannot be defeated by the State claiming a justification for the violation of such right under the guise of local practice.

CONCLUSION.

The right to be secure against unreasonable search and seizure is a fundamental principle of liberty and justice and as such is protected by the Fourteenth Amendment. The highest Court of the State of Cali-

fornia has so construed the State constitutional provision prohibiting unreasonable searches and seizures so as to deny this fundamental right and authorize its violation by State officers and the use of evidence so unlawfully obtained without affording any remedy and redress to the injured person in the California Courts. This is a denial of a fundamental Federal right, such denial being justified and sanctioned by the State constitutional provision as construed by the California Supreme Court.

The petition for removal sets forth every fact showing the denial and deprivation of this right and therefore states full and complete grounds for the removal of the cause from the State Court to the District Court under Section 31 of the Judicial Code. It follows that jurisdiction of the cause was vested in the District Court and that Court had the power to issue an injunction to preserve its jurisdiction. The complaint stated a cause of action and the District Court erred in granting the motion to dismiss and in refusing to issue an interlocutory injunction.

Dated, San Francisco,
July 9, 1947.

Respectfully submitted,
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